

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 13

ROSELAND COMMUNITY HOSPITAL ASSOCIATION<sup>1</sup>

Employer

And

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 73-HC, AFL-CIO

Petitioner

Case 13-RC-20793

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record<sup>2</sup> in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.<sup>3</sup>

3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:<sup>4</sup>

All full-time and regular part-time registered nurses, including charge nurses, staff registered nurses, infection control clinicians, employee health nurses, and registered nurse utilization review case managers, employed by the Employer at its facilities currently located at 45 W. 111th Street, Chicago, Illinois (Roseland Community Hospital); 1701 West Monterey, Chicago, Illinois (Monterey Health Center); and 101 West 111<sup>th</sup> Street, Chicago, Illinois, (Women, Infant and Children's Program); but excluding all business office clerical employees, skilled maintenance employees, technical employees, other non-professional employees physicians, other professional employees, guards and supervisors as defined in the Act.

**DIRECTION OF ELECTION\***

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at

the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Service Employees International Union, Local 73-HC, AFL-CIO.

#### LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision 2 copies of an election eligibility list, containing the full names and addresses of all of the eligible voters, shall be filed by the Employer with the undersigned Regional Director who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in **Suite 800, 200 West Adams Street, Chicago, Illinois 60606** on or before August 7, 2002. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

#### RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court Building, 1099-14th Street, N.W., Washington, D.C. 20570**. This request must be received by the Board in Washington by August 14, 2002.

**DATED** July 31, 2002 at Chicago, Illinois.

/s/Elizabeth Kinney

Regional Director, Region 13

\*/ The National Labor Relations Board provides the following rule with respect to the posting of election notices:

(a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Director in the mail. In all cases, the notices shall remain posted until the end of the election.

(b) The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.

(c) A party shall be estopped from objection to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Director at least 5 working days prior to the commencement of the election that it has not received copies of the election notice.

- 1/ The names of the parties appear as amended at the hearing.
- 2/ The arguments advanced by the parties at the hearing and in their briefs have been carefully considered.
- 3/ The Employer is an Illinois corporation engaged in the business of providing acute care health services.
- 4/ The Petitioner seeks to represent a unit of all full time and regular part time registered nurses.

The Employer is a 160 bed, acute care health care services provider. The only issue to be resolved in this case is whether charge nurses should be included in the unit as registered nurses or excluded as supervisors. The Employer contends that the charge nurses are supervisors, while the Petitioner claims they are employees and should, therefore, be included in the petitioned-for unit. There are a total of 26 full time charge nurses involved herein. While some nurses fill in as relief charge nurses when a full-time charge nurse is not present, the parties stipulated that relief charge nurses are appropriately included in the petitioned-for unit. The parties have also stipulated that Advanced Practice Nurse Jeraldene Shaffer, who on occasion fills in as House Administrator, shall vote under Challenge. Although the parties have stipulated to a multi-facility unit, all of the charge nurses at issue work at the Roseland Community Hospital facility located at 45 W. 111<sup>th</sup> Street in Chicago Illinois (hereafter the Employer or the Hospital).

The Employer asserts that the charge nurses are supervisors based on various factors. However, the Employer presented no evidence, nor does it contend in its brief, that charge nurses have any authority to hire, transfer, suspend, lay off, recall, promote, discharge, or reward other employees, either directly or through effective recommendation. Accordingly, the only statutory indicia at issue here concern the charge nurse's ability to assign, discipline, responsibly direct, and adjust the grievances of other employees. The Employer also relies on various secondary indicia to support its contention that the charge nurses are supervisors.

I conclude that the Employer has failed to present evidence that charge nurses engage in any of the statutory indicia with sufficient independent judgment to render them supervisors. Accordingly, I find that the Employer's reliance on the secondary indicia of supervisory status is misplaced. Thus, I find that the charge nurses at issue here are appropriately included in the petitioned-for unit.

## **I. The Applicable Legal Principles**

As the party asserting that the charge nurses are supervisors, the Employer bears the burden of proof. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 710 (2001). In order to meet this burden, the Employer must demonstrate, by a preponderance of credible evidence, that the charge nurses engage in activities described in Section 2(11) of the Act. *Star Trek: The Experience*, 334 NLRB no. 29 slip op. at 6 (2001). Section 2(11) of the Act defines a "supervisor" as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The exercise of any one of these types of authority is sufficient to confer supervisory status; however, it is well settled that such authority must be exercised “with independent judgment on behalf of management and not in a routine or sporadic manner” (Citation omitted), *International Center for Integrative Studies/The Door*, 297 NLRB 601 (1990). The exercise of some supervisory authority “in merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status on an employee.” (Citation omitted). *Bowne of Houston, Inc.* 280 NLRB 1222, 1223 (1986); *Clark Machine Corp.*, 308 NLRB 555 (1992). In each case, the differentiation must be made between the exercise of independent judgment and the routine following of directions; between effective recommendation and the forceful suggestion; and between the appearance of supervision and supervision in fact. See *Chevron Shipping Co.*, 317 NLRB 379 (1995); *J.C. Brock Corp.*, 314 NLRB 157 (1994). Because the statute is ambiguous as to the degree of discretion required for supervisory status, it is within the Board’s discretion to determine this issue. *Kentucky River*, 532 U.S. at 713. See also *Beverly Health & Rehabilitation Services*, 335 NLRB No. 54, slip op. at 1-2 fn. 3; 30-37 (LPNs not statutory supervisors where the judgment that they exercised in directing other employees was insufficient to be considered supervisory independent judgment); *Dynamic Science, Inc.*, 334 NLRB No. 57 slip op. at 1 (2001) (artillery test leaders not statutory supervisors because the test leaders’ role in directing employees is “extremely limited and circumscribed by detailed orders and regulations issued by the Employer and other standard operating procedures.”)

In the event that “the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Conclusionary evidence regarding the possession of Section 2(11) indicia, whether the evidence is contained in job descriptions, *Crittendon Hospital*, 328 NLRB 879 (1999), or testimony, *Sears Roebuck & Co.*, 304 NLRB 193 (1991), is sufficient to establish supervisory status. Thus, where there exists general conclusionary evidence that individuals are responsible for supervising, directing, or instructing others, such evidence, standing alone, is deemed insufficient to prove supervisory status because it does not shed light on exactly what is meant by such general words or whether an individual engaging in those activities is required to exercise independent judgment.

## **II. Departments Where Charge Nurses Work and the Supervisory Hierarchy in Those Areas**

There are seven departments where the Hospital employs charge nurses: 1) Med/Surg and Pediatrics, 2) Telemetry, 3) the Emergency Room (ER), 4) the Intensive Care Unit (ICU),

5) the Department of Surgery, 6) Perinatal Services, which includes Obstetrics and the Nursery, and 7) the Detox Unit (Detox). Four unit directors oversee these seven departments.<sup>i</sup> The parties stipulated that Gloria Blyden, the Vice President of Patient Care Services and the Employer's only witness herein, and the unit directors, are supervisors within the meaning of the Act.

The departments at issue either have three 8-hour shifts or two 12-hour shifts per day, seven days a week for charge nurses, staff RNs and most of the other patients care employees. There is one charge nurse assigned to each shift in all seven departments. The remaining patient care staff, including RNs and CNAs, reports to the charge nurse on their shift. During the day shift, charge nurses in turn report to their respective unit directors. However, during "off shifts", which includes the 7 p.m. to 7 a.m. shift, the 3 p.m. to 11 p.m. shift, and the 11 p.m. to 7 a.m. shift, there are not always unit directors present at the hospital, although unit directors are considered on-call 24 hours a day. Therefore, during off shifts, the Employer employs a house administrator, who is an RN responsible for coordinating and supervising all areas of the hospital's activities, including all of the departments where the Hospital employs charge nurses. The parties stipulated that the house administrator is a supervisor within the meaning of the Act.

The house administrator has an office, but is expected to be on the units during his or her shift. In addition, the house administrator carries an Employer provided pager, with the pager number posted at each department's nursing station. There is one full-time house administrator, Reginald Threatt, who works Sunday through Thursday, from Midnight to 8 a.m. There are also 14 part-time house administrators who work during the 3 p.m. to 11 p.m. and 11 p.m. to 7 a.m. shifts. Accordingly, even during the off shifts, charge nurses are not the highest-ranking individuals at the Hospital.

### **III. The Evidence and Analysis of the Charge Nurses' Supervisory Authority**

As noted above, the only statutory indicia at issue concern the charge nurse's ability to assign, discipline, responsibly direct, and adjust the grievances of, other employees. In addition, the Employer relies on various secondary indicia to support its contention that the charge nurses are supervisors. I find that the Employer has failed to satisfy its burden of proving that charge nurses are supervisors within the meaning of the Act.

#### **A. Charge Nurses Assignments**

Charge nurses at the Hospital engage in various tasks that could be considered either as assigning work, or as responsibly directing the work, of others. This is because the distinction between assigning work and responsibly directing employees is often difficult to draw. Accordingly, the various aspects of the charge nurse's duties that could arguably come under either category will be described and analyzed together.

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<sup>i</sup> The witnesses also referred to the Detox Unit Director as the Detox Manager. However, since the title, for the purposes of this case, is a distinction without particular relevance, I will refer to that person as a unit director for the sake of simplicity.

Specifically, charge nurses assignment of employees to particular days and assigning break times, reassigning employees to different departments, calling employees in to work and sending them home, assigning particular tasks, including which patients they will be caring for during a shift and responsibility for the work in the department, and allowing employees to leave work due to illness, will be examined here.

I find that, on balance, charge nurses do not exercise independent judgment in these duties.

### **1. Assigning Employee to Work Particular Days and Assigning Breaks**

Blyden testified that some charge nurses assist their respective unit directors in making out the work schedule for their departments. Specifically, Blyden testified that specific charge nurses in ICU, ER, Med/Surge & Pediatrics and Telemetry assist in developing a six-week work schedule in their areas. She identified the following employees who perform this duty: Connie Dizon and Alpha Thompson in the ICU, Narcisa Fletcher and Gloria Marshall in the ER; Purification Gayatin in Med/Surg and Pediatrics; and Brenda Love-Myles and Catherine Mendoza in Telemetry. Blyden explained that the named charge nurses may sit down with the unit director and prepare the schedule, or they may prepare an initial draft of a six-week schedule that identifies which days and on what shift the employees will work, based on the staffing pattern, and give it to the unit director. The staffing pattern, which will be discussed in greater detail in another section, is a formula created by Blyden and the unit directors which sets the number of staff needed for a shift. There is no evidence that charge nurses play any role in establishing the staffing pattern.

There is no evidence regarding charge nurses assigning other employee's work schedules in the Department of Surgery, Perinatal Services and Detox. Moreover, Blyden stated that although charge nurses may prepare an initial draft of the schedule, they are not privy to the vacation schedules of the other employees since unit directors are responsible for approving paid time off (PTO) requests. Thus, unit directors may have to alter the draft submitted to them by the charge nurses. Unit directors, according to Blyden, remain ultimately responsible for the six-week work schedules. Moreover, Blyden admitted that she is not directly involved in the process and, therefore, is unsure exactly how much weight is given to the charge nurse's draft of the schedule.

Based on the foregoing, I conclude that the Hospital has failed to establish that any charge nurses assign work schedules for other employees sufficient to warrant a finding that they are supervisors within the meaning of the Act for three reasons. First, there is no evidence that any Department of Surgery, Perinatal Services or Detox charge nurses perform this function. The same is true for those charge nurses in ICU, ER, Med/Surg & Pediatrics and Telemetry who do not assist in preparing the work schedule. Therefore, I find that these charge nurses are not supervisors based on this factor.

Second, for the seven charge nurses who Blyden testified assist in preparing the work schedule, I find that the Employer has failed to show that they exercise independent

judgment in performing this duty. None of the charge nurses or the unit directors explained how they go about this task. Accordingly, the record does not establish that the charge nurses exercise sufficient independent judgment in this matter to be deemed supervisors. This is especially true given the fact that Blyden testified that staffing levels are predetermined based on the staffing pattern, making the task appear merely routine and clerical. I, therefore, conclude that the Hospital has failed to establish that these seven charge nurses exercise independent judgment in assigning work schedules to other employees. Similarly, the record is silent as to the precise degree to which the charge nurses' recommendations on scheduling matters are followed. Since the schedules are admittedly subject to some revision based on vacation schedules that are unknown to the charge nurses, the evidence in the record suggests that the charge nurses do not effectively recommend scheduling matters.

Employees in the various departments at issue receive one 30-minute lunch break and one 15-minute break. At least some charge nurses have a role in determining the break schedules of other employees. For example, charge nurse, Sarah Reynolds explained that she schedules the breaks for the employees on her unit, taking into consideration the preferences of the individuals and patient care needs. Similarly, according to Blyden, charge nurses have the authority to ask employees to work through their breaks, depending on "what's going on in the unit". However, Blyden admitted that she is not familiar with the details of how breaks are actually assigned on the units. For example, she could not specify whether it is the charge nurse or the staff member themselves that makes the determination that patient care needs are paramount to a scheduled break. However, Detox charge nurse Ruth Jones testified that as far as scheduling breaks, the staff works out the break schedule among themselves.

I find that this evidence is insufficient to conclude that charge nurses exercise independent judgment in assigning breaks to employees. The authority to approve breaks has been found to be a routine clerical judgment not requiring the exercise of independent judgment. *Loyalhanna Care Center*, 332 NLRB No. 86, slip op. at 3 (2000). Likewise, the charge nurses' authority to postpone scheduled breaks based on conditions on the unit does not confer supervisory authority. *Azusa Ranch Market*, 321 NLRB 811, 812 (1996). (the fact that an employee's break was occasionally delayed, if the store was especially busy, was insufficient to warrant a finding of supervisory status, as there was no evidence that this decision was anything other than a routine clerical judgment) Thus, I find that the Employer has not satisfied its burden of demonstrating that charge nurses exercise independent judgment in assigning breaks to other employees.

In sum, the charge nurses do not exercise supervisory authority either in creating work schedules or assigning nurses to breaks.

## **2. Reassigning Employees to a Different Department and Calling Employees In and Sending Them Home**

The number of nurses assigned to work a shift varies depending on the number of patients in the department. In that regard, each year, Blyden and the unit directors

prepare two documents: a staffing pattern and a staffing matrix. The staffing pattern is based on the average daily number of patients, known as the census, for each department. Thus, the staffing pattern is used to determine future work schedules, i.e., the number of RNs, CNAs and other patient care employees who will be assigned to work during a given shift on a given day. The staffing matrix, on the other hand, is used to adjust the number of staff on a day-to-day basis, depending on whether the census is higher or lower than the average.

There is no evidence that charge nurses provide any input into determining either the staffing pattern or the staffing matrix. However, charge nurses use the staffing matrix to adjust staffing levels on their shift. There are essentially three situations where charge nurses utilize the staffing matrix: a) when the census indicates that there is too many employees in a given shift, thus, the department is overstaffed; b) when the census indicates that there is not enough employees to care for the number of patients, i.e. an understaffing situation; and c) when it is believed that, despite the dictates of the staffing matrix, because of the acuity of the patients, additional staff is required to properly care for the patients.

#### **a. The Overstaffing Situation Based on the Staffing Matrix**

Two things may occur when the patient census is too low to warrant the number of nurses scheduled to work. In such circumstances, an employee may either be “pulled” to another department that needs additional employees, or, an employee may be sent home. Each department that allows nurses to pull, or be pulled, maintains a “pull book”. It lists the employees and the last time they were pulled to another department, so pulls are rotated among the staff. Being sent home based on a low census, known simply as a “low census day” is also rotated among the staff. Thus, the person selected for a low census day is also based on a list kept in each department. The employee sent home on a low census day may choose, at their option, whether to take PTO, or to not be paid for the day.

During the day shift, Blyden stated that the unit director decides who takes the low census day. However, during off shifts, Blyden explained that charge nurses make the decision. The overstaffing procedure, according to Blyden, requires the charge nurse to call other departments to see if they need employees, and if they do not, to send the extra employee home. However, the off shift charge nurse makes the decision as to which employee will be pulled based on the pull book. Blyden was unaware of any situation where the pull book was not followed, although she claimed that, theoretically, the charge nurse could decide not to follow the pull book.

Charge nurse Ruth Jones testified regarding the overstaffing situation in Detox, which is considered a non-pull unit, meaning the staff is not generally reassigned to other departments. She stated that if they are overstaffed, based on the matrix, then employees, including herself, are asked to take a low census day. There is no evidence regarding who makes the decision as to who does not work in an overstaffing situation in Detox.

Charge nurse Sarah Reynolds also testified generally about staffing issues she deals with on the 11 p.m. to 7 a.m. shift in the Med/Surg and Pediatrics Department. She explained that near the end of her shift, she discusses staffing needs for the day shift with the house administrator, Reginald Threatt. Like Blyden, Reynolds explained that the pull book and the list concerning who has taken the last low census day generally govern decisions as to reassigning employees and sending them home. However, if deviations are made, Threatt makes the final decision although Reynolds said she might make suggestions. For example, Reynolds explained that a nurse may volunteer for a low census day and she will inform Threatt of such a request. However, despite such a request, if that person is the only qualified pediatric nurse for the shift and there are pediatric patients requiring care, Reynolds will recommend that the request not be granted. In any event, however, Reynolds testified that Threatt makes the final decision and does not necessarily follow her recommendation.

#### **b. The Understaffing Situation Based on the Staffing Matrix**

If the patient census increases such that, with reference to the staffing matrix, additional employees are warranted, a charge nurse may ask additional employees to work. It logically follows, given the overstaffing option discussed above, that when understaffing occurs, it may be corrected through the pulling process. However, the record does not reveal what role, if any, the charge nurses play in deciding whether to accept employees pulled from other departments.

According to Blyden, a charge nurse may ask an employee to stay past their scheduled shift, or may call employees and ask them to work. However, Blyden admitted that charge nurses do nothing more than request, albeit as persuasively as possible, that an employee work extra.

Jones also testified regarding the understaffing situation in Detox. According to her, if the Detox census increases, she can ask employees to come in and work. She testified that she typically follows the staffing matrix. Thus, if the staffing matrix indicates more staff, she seeks volunteers to stay over or come in to work. Jones, like Blyden, testified that she has no authority to require an employee to work after their scheduled shift time or to come in to work when they were not scheduled to do so.

#### **c. The Perceived Understaffing Situation, Irrespective of the Staffing Matrix**

Jones also testified regarding times when she believed additional assistance is needed on the unit, beyond what is called for in the matrix. In such circumstances however, she speaks to her unit director, who may or may not authorize additional staffing. Significantly, there is no evidence that Jones considers the skill level of the staff in deciding who to ask to work. Reynolds also testified generally about perceived understaffing situations. In that regard, she stated that, although she may make suggestions, Threatt makes the final decision as to whether deviations from the staffing matrix are warranted.

I find that the Hospital has failed to establish that the charge nurses' role in the any of the above situations warrants finding that they are supervisors. The evidence plainly demonstrates that charge nurses generally rely on the staffing matrix. There is no evidence that the charge nurses establish the level of staffing required for any given shift or department and no evidence regarding the procedure they use in determining whom to call. *Green Acres Country Care Center*, 327 NLRB 257, 258 (1998). Rather, the evidence reveals that charge nurses merely ask for volunteers and do not have authority to require off-duty employees to come in to work or to require employees from a prior shift to stay over. The Board has held that, without the authority to compel an employee to work, responsibility to call in employees is too limited to constitute supervisory authority. *Harborside Healthcare, Inc.*, 330 NLRB 1334, 1336 (2000); *Youville Health Care Center, Inc.* 326 NLRB 495, 496 (1998).

Likewise, charge nurses' authority to transfer employees between departments in the event that a unit is understaffed does not confer supervisory status, in the absence of evidence that such transfers involve anything more than a routine judgment as to the number of employees needed to serve a particular number of patients. *Northern Montana Health Care Center*. 324 NLRB 752, 754 (1997), enforcement granted in relevant part, *Northern Montana Health Care Center v. NLRB*, 178 F.3d 1089 (9<sup>th</sup> Cir. 1999). Here, the number of staff needed to care for the patient census on a unit is determined by the staffing matrix. Two witnesses, Jones and Reynolds, testified based on personal knowledge of the communication between charge nurses and unit directors and house administrators as to who decides whether there will be a deviation from the staffing matrix. Both testified, without contradiction, that the unit director or house administrator makes the ultimate decision on whether to disregard the staffing matrix.

### **3. Assigning Particular Tasks to Other Employees and Responsibility for the Department**

Charge nurses determine which patients the RNs and CNAs will be caring for during their shift. The witnesses called by both the Hospital and the Petitioner testified relatively consistently about this assignment process. They explained that the charge nurse makes the decision based on various factors. Reynolds, for example, explained that she bases her patient assignments on "two or three parameters" including "the acuity of the patients and the nurse's experience, whether she can handle that type of patient or not." She stated that she also looks at whether the nurse has cared for the patient previously, so as to maintain "continuity of care for our patients," which she explained is an important policy at the Hospital.

In addition, Reynolds explained that during times when a nurse "had a really bad patient and it was really bad on one nurse", she will switch the patient to give that nurse a break. Reynolds explained that in her department, the charge nurse on the preceding shift makes the initial patient assignments and that, after considering the above factors, she may decide to make changes in the suggested assignments.

The Hospital maintains a book of competencies in each department. It lists what skills and certifications the employees possess. However, no witness testified that the book is consulted when assigning patients to employees. Thus, it appears that the competencies of the staff are well-known.

There is minimal evidence in the record regarding assignment of more menial jobs by charge nurses. It includes little more than conclusory testimony regarding assigning such work as cleaning tasks to CNAs. There is no evidence to suggest that any complex factors beyond fairness and equalization of work are at play in the assignment of these jobs by charge nurses. Finally, the Employer stresses in its brief the testimony by Reynolds that she is “responsible” for her shift and, in particular the work of CNAs, since they are less skilled. However, there is no evidence concerning in what manner she is responsible for her unit. Clearly she is not responsible for deciding what treatments the patients receive, as she is merely expected to see that the doctors’ orders are carried out.

Although a close case, I find that the Employer has failed to demonstrate that the charge nurses exercise a degree of independent judgment in the assignment of work and direction of employees sufficient to accord supervisory status. To the degree that the charge nurses base their assignments on the type of assistance needed and the skills of the CNA, the Board has found that work assignments made based on assessments of employees’ skills, when the differences in skills are well known, are routine functions that do not require the exercise of independent judgment. *Parkview Manor*, 321 NLRB 477, 478 (1996), overruled on other grounds by *Premier Living Center*, 331 NLRB No. 9 (2000); *Clark Machine Corp*, 308 NLRB 555 (1992). Moreover, it does not require a great deal of judgment to assign a particular type of patient to a staff RN who has some experience with that type of patients, rather than to one who does not.

#### **4. Allowing Employees to Leave Work Due to Illness**

There is some evidence to suggest that charge nurses have some role in allowing employees to leave work due to illness. According to Blyden, during an off shift, charge nurses may allow employees to leave work if they are sick. In addition, Blyden stated that while a charge nurse will call the house administrator or the unit director to inform them that she has one less staff person, it is the charge nurse who decides, “what happens”. In addition, Blyden admitted that she is not present, and therefore not aware of the nature of the communication between the charge nurse and the house administrator or unit director. Thus, Blyden could not explain the precise authority exercised by the charge nurse in such a circumstance.

Significantly, during cross-examination, Blyden, when asked who approves sick leave stated that she wasn’t sure what was meant by that since, when someone is sick, “they have to take the day off. And you really don’t have any control over that.” Both Jones and Reynolds explained that if an employee says he or she is sick, they would contact their unit director or the house administrator. They testified that it would be the unit director or the house administrator who would then decide whether to send the employee home, or send them to the ER for treatment.

Because of the conflict between the testimony of Blyden and that of Jones and Reynolds, I find that the record is inconclusive on this issue. Therefore, I conclude that the Hospital has failed to meet its burden of showing that charge nurses exercise independent judgment in allowing employees to leave work due to illness.

### **B. Charge Nurses Ability to Discipline Employees**

The Employer has a progressive discipline policy, which, according to Blyden, consists of verbal counseling, 1<sup>st</sup> and 2nd written warnings, suspension, and finally discharge. However, Blyden testified at length regarding what she apparently considers the two main forms of discipline at the hospital: an anecdotal note and an Employee Performance Notice (EPN). Blyden testified that an anecdotal note is less formal than an EPN, since anecdotal notes are only kept in the department where the employee works, while an EPN goes to the employee's personnel file in the human resource department.

However, Blyden did not give many details about exactly how anecdotal notes are prepared and maintained. What form the notes take was not described, such as whether there is a pre-printed form or it is simply a note written on an otherwise blank page. Nor did Blyden explain who all has the authority to issue anecdotal notes. Similarly, Blyden did not testify as to where exactly these anecdotal notes she referred to are actually kept. For example, it is unclear whether each department maintains a "mini" personnel file for each employee, or whether all anecdotal notes for all the department's employees are kept in one file. In addition, it is unclear whether the anecdotal notes she discussed are kept indefinitely or if they are discarded after some period of time, or if or when, the employee improves the performance that was the subject of the note. Most significantly, however, on cross-examination, Blyden admitted that anecdotal notes are not part of the Hospital's formal disciplinary process.

Neither charge nurse that testified was familiar with the term anecdotal note as even an arguable form of discipline at the Hospital. Indeed, Sarah Reynolds stated that she keeps anecdotal notes on her own calendar, for her personal use as a memory aid, and that she was not aware of the form of anecdotal notes described by Blyden. Similarly, Ruth Jones explained that she was "not clear" on what an anecdotal note is. Also, the Employer failed to offer into evidence an anecdotal note or EPN that was issued by a charge nurse.

Although not in and of itself a disciplinary action, Blyden and other witnesses also testified about what is known as an incident or occurrence report. The various witnesses consistently testified that any hospital employee who observes an unusual event, for example, a hospital policy that has not been followed, is required to fill out an incident report. These incident reports may ultimately lead to discipline. However, incident reports are given to the unit director responsible for the area involved. Moreover, Blyden made clear in her testimony that it is then the unit director's responsibility to conduct an investigation into the matter, and to "sign off" on any discipline that may result from the incident report.

Blyden testified about three examples of charge nurses disciplining other employees. The first involved ER charge nurse Narcisa Fletcher. Blyden could not recall the name of the nurse who was disciplined, nor any better approximation of the date than possibly within the last six months. She described the discipline as Fletcher having a nurse that was not triaging patients within the Hospital's 15-minute guideline and that, as a result, that nurse was removed from the position of triage nurse. However, Blyden did not comment on how the decision to remove the nurse was made. Thus, it is unclear whether Fletcher made a recommendation that the nurse be removed from the position or whether her removal was mandated by her failure to timely triage patients according to the Hospital's policy. During direct testimony, Blyden stated she was aware of this discipline by Fletcher because all such discipline matters come to her office. However, on cross-examination, Blyden clarified that she received the report about the triage nurse from a house administrator and that she discussed the matter with the unit director, but not with the charge nurse. Thus, from Blyden's testimony, Fletcher's exact role in the matter is, at best, speculative.

The second example Blyden described concerning a charge nurse issuing discipline involved ER charge nurse Gloria Marshall. According to Blyden, the incident took place within the past year sometime, and involved a nurse's failure to properly take vital signs on an infant. During her direct testimony, Blyden stated that the nurse therefore received anecdotal notes and training. However, on cross-examination, Blyden claimed that she was almost 100% sure that the nurse actually received formal discipline, specifically an EPN. Blyden also admitted that it was a unit director that signed off on the discipline. As for charge nurse Marshall's role in the discipline, Blyden stated that she had written an incident report and that the unit director then wrote out the EPN. However, other than that, Blyden did not explain the nature of Marshall's role in the discipline. Thus, it is unclear whether Marshall recommended formal discipline, and whether, or to what extent, the unit director, who Blyden admitted is expected "to look into the matter", conducted his own investigation of the incident.

The third example of discipline offered by Blyden involved charge nurse Purification Gayatin. There, a doctor had ordered a special diet for a patient so as to base insulin injections on the patient's response to the diet. However, a staff RN improperly entered the diet order into the computer. Blyden stated that the RN was given anecdotal notes and counseling as a result, but did not give specifics regarding Gayatin's role in this. However, during cross-examination, Blyden claimed that the RN was, in fact, given formal written discipline. She went on to clarify that it was the unit director who issued the discipline. Again, Gayatin's role was not described, other than Blyden said she spoke to her about the incident.

In contrast, both Reynolds and Jones denied ever issuing an EPN or being told they had the authority to issue an EPN. Indeed, according to Jones, it was not until the morning of the hearing that that she was told she even had the authority to recommend discipline. Rather, Jones stated that in Detox, if something happens on her shift that she believes

may warrant discipline, she notifies her unit director. Thereafter she is not involved in the discipline process, and is not even aware of what, if any, discipline is ultimately issued. Likewise, Reynolds testified that on the Med/Surg and Pediatrics unit, she prepares an incident report if she observes anything unusual and that she also calls the house administrator, Reginald Threatt to report the incident. Once she completes the incident report, she gives it to Threatt or to her unit director. According to Reynolds, she does not give a recommendation regarding discipline based on the incident she has reported.

Reynolds testified about one specific incident where she prepared an incident report. It involved an allegation that a staff member improperly touched a patient in about mid-June, 2002. According to Reynolds, she was checking on a patient when the patient indicated that a male nurse may have touched her in a way “he shouldn’t have”. Reynolds then asked another nurse to come and witness the patient’s account of the incident. Reynolds then called Threatt, who told her to do an incident report so it could be handed over to the unit director. After completing the incident report, Reynolds was not involved in the investigation of the matter, nor did she make a recommendation as to what should happen to the staff member. Rather, Unit Director Theresa Hamilton came on to the unit after 11 p.m., interviewed specific people about the incident and, to Reynolds’ knowledge, the staff person accused was not disciplined.

I find that the foregoing evidence fails to establish that charge nurses exercise independent judgment in issuing discipline. As for anecdotal notes and incident reports, Blyden admitted they are not, in fact part of the Employer’s discipline process. Thus, to the extent charge nurses prepare them, it does not establish that charge nurses therefore discipline other employees. Moreover, the record makes clear that any employee who witnesses an unusual occurrence is required to so report it.

The Employer stresses in its brief that the decision as to whether an event is unusual enough to warrant a report requires the use of independent judgment. I find this fact unpersuasive as to the issue before me. While technically true, this does not establish the power to discipline based on preparing an incident report. Rather, the evidence is clear from the above examples that an incident report merely causes the Employer to initiate an investigation into the matter. It is clear that unit directors, and not charge nurses, conduct the investigation and, if necessary, issue an EPN. Thus, I find the Hospital assertions in this regard unavailing. Where, as here, there is no evidence that the reports contain recommendations as to discipline, or that they automatically result in discipline, supervisory authority to discipline others had not been established. *Ten Broeck Commons*, 320 NLRB 806, 812 (1996); *Passavant Health Center*, 284 NLRB 887 (1987).

Although Blyden claimed charge nurses have the authority to issue an EPN, the Employer produced no EPN’s given to other employees by a charge nurse. The Hospital also did not offer testimony of any examples of a charge nurse issuing an EPN. Moreover, both charge nurses denied ever doing so, or being told they had authority to do so. In the absence of such critical evidence, I find that Blyden’s conclusory testimony is

insufficient to carry the Employer's burden that charge nurses have the statutory authority to issue discipline.

### **C. Charge Nurses Ability to Adjust Employee Grievances**

Although there was vague and general testimony to the effect that charge nurses are expected to "resolve conflicts" between other employees, no detailed testimony was provided. For example, Blyden testified that charge nurses receive training in order to be able to resolve conflicts. However, she did not explain what types of conflicts charge nurses are expected to resolve. Nor did the Employer offer any examples of conflict resolutions by charge nurses upon which to base a decision.

Accordingly, I conclude that there is insufficient evidence to find that charge nurses exercise independent judgment in adjusting employee grievances. Moreover, even assuming charge nurses may resolve minor disputes among employees, as the training materials presented by the Employer suggest, this would be insufficient to confer supervisory status on them. *Riverside Health Care Center*, 304 NLRB 861, 865 (1991)

### **D. The Secondary and Other Indicia Offered by the Hospital to prove that Charge Nurses are Supervisors**

In addition to the statutory indicia described above, the Employer also asserts that certain other factors warrant a finding that charge nurses are supervisors. Specifically, the Employer points to the following factors as qualifying charge nurses as supervisors: 1) they are paid more than RNs; 2) they train other employees on their unit; 3) they receive special training from the Employer; 4) they do not generally have patients assigned to them; 5) they inspect the work of the other employees; and 6) they are involved in evaluations of other employees.

Substantial differences in terms and conditions of employment, while not statutory indicia, may serve to militate in favor of finding supervisory status. *North Shore Weeklies, Inc.*, 317 NLRB 1128 (1995). They are not, however, dispositive. *General Security Services Corp.*, 326 NLRB No. 42 (1998). Moreover, a difference in salary and being the highest-ranking person on the premises may not establish supervisory status. *Ken Crest Services*, 335 NLRB No. 13 (2001).

The evidence reveals some differences in terms and conditions of employment for charge nurses. Charge nurses receive an additional \$1 per hour over what staff RNs are paid. Although the Employer sometimes uses charge nurses as "preceptors" who orient new employees, several witnesses testified that a preceptor need not be a charge nurse. Rather, a new employee's preceptor may be a staff nurse.

Charge nurses also receive training from the Employer that is apparently designed to make them more effective in their position. The training material offered into evidence by the Employer consists of a handout regarding such things as acting as a role model for the other employees and mastering various principles "to become more effective and

contribute to the productivity of your organization”. Skills such as being a good communicator and managing conflicts are discussed.

Although Blyden testified that the goal is that charge nurses do not care for patients, she admitted that it does happen. Detox Charge nurse Ruth Jones testified that she cares for patients nearly 100% of the time, while Reynolds testified that she has patients “usually all the time.” Charge nurses do not have their own offices, although they may have a designated space at the nurse’s station in their department.

Even assuming these differences in terms and conditions of employment are substantial; I conclude that, without more, the Hospital’s reliance on these factors is misplaced. *General Security Services Corp.*, supra. In addition, I note that the Employer has cited no case where the Board relies on the fact that a class of employees receives special training is probative of their supervisory status. Moreover, the evidence establishes that charge nurses are not the highest-ranking employees on the premises, even during off shifts given the presence of the house administrator. Thus, this factor does not support the conclusion that charge nurses are supervisors. *Ken Crest Services*, supra.

Finally, I conclude that the evidence regarding charge nurses participation in the evaluations of other employees is inadequate to find they are supervisors. According to Blyden, most, if not all charge nurses are involved in the annual written evaluations of employees on their units. However, Blyden testified that unit directors retain the ultimate responsibility for the evaluations. Specifically, Blyden stated that a charge nurse may prepare a draft of an evaluation, then the unit director and the charge nurse talk about it, and then the evaluation is prepared and sent to human resources. Blyden admitted during her direct testimony that unit directors may modify the drafts prepared by the charge nurse. For example, if the unit director observes the employee performing better than how the charge nurse rated the employee, she may change the evaluation. According to Blyden, evaluations can impact on an employee’s raise.

However, Blyden admitted that she is not present during the evaluation process, and therefore is unaware of the actual interaction between the charge nurses and the unit directors with respect to evaluations. Moreover, Sarah Reynolds, one of the charge nurses identified by Blyden as having either actually evaluated or as possessing the authority to evaluate other employees, also testified about the evaluation process. However, Reynolds denied ever being asked to give input into an evaluation, much less ever being asked to prepare a draft of an evaluation. Rather, according to Reynolds, she does not even see the evaluations of other employees unless the individual who received the evaluation shows it to her. Yet this only occurs once it has been presented to the employee, after the evaluation process has been completed. Finally, the Employer presented no testimony by any charge nurse or unit director to explain the precise nature of the charge nurse’s role in evaluations.

Based on the above evidence, I find that the charge nurses’ role in giving input or preparing drafts of evaluations of other employees does not meet the requirements of Section 2(11) for three reasons. First, merely providing general input into an evaluation,

without more, is clearly insufficient to make an individual a supervisor. The record is silent as to the nature of the input and the weight given to it. This compels the finding that the Hospital has failed to carry its burden that charge nurses exercise independent judgment in evaluating employees such that they are supervisors under Section 2(11). *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139-1140 (1999).

Second, that some charge nurses may prepare draft evaluations does not confer supervisory status on them. Here, the testimony makes clear that even when charge nurses prepare drafts of evaluations they are subject to independent review by a higher authority. In such circumstances, the Board will not find supervisory authority. *Children's Farm Home*, 324 NLRB 61 (1997).

Third, even if the Hospital were to have proven that charge nurses independently conduct employee evaluations, which they have not, the Board has declined to find supervisory status when employees perform evaluations that do not, by themselves, directly affect other employees' job status. *Vencor Hospital-Los Angeles*, 328 NLRB at 1139; *Ten Broeck Commons*, 320 NLRB 806, 813 (1996). Nonetheless, even assuming for the sake of argument that the charge nurses here independently conduct evaluations, I find that the Hospital has failed to demonstrate that the evaluations here have the necessary direct correlation to job status. Indeed, the sum of the evidence in this regard is Blyden's testimony that evaluations are used to determine raises. That is insufficient to conclude that the evaluations have the direct effect on job status required by the Board. Cf. *Bayou Manor Health Center*, 311 NLRB 955 (1993).

#### **IV. Conclusion**

In sum, for the reasons set forth above, it is the opinion of the undersigned that there is insufficient evidence to conclude that the charge nurses at issue are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I find that charge nurses are employees and therefore appropriately included in the petitioned-for unit. There are approximately 150 employees in the unit found appropriate herein.

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Voter Elig.-Statutory Exclusion-Sups, Guards